APPENDIX A TO PART 240.—SCHEDULE OF CIVIL PENALTIES—Continued

Section	Violation	Willful violation
* * * * * * *		
240.305—Prohibited conduct:		
(a) Unlawful:		
(1) control of speed	2,500	5,000
(2) passing of stop signal	2,500	5,000
(3) occupancy of main track without authority	2,500	5,000
(b) Failure of engineer to:		
(1) carry certificate	1,000	2,000
(2) display certificate when requested	1,000	2,000
(c) Failure of engineer to notify railroad of limitations or railroad requiring engineer to exceed limitations	4,000	8,000
(d) Failure of engineer to notify railroad of denial or revocation	4,000	8,000
* * * * * * *		
240.307—Revocation of certification:		
(a) Failure to withdraw person from service	2,500	5,000
(b) Failure to notify, provide hearing opportunity; or untimely procedures	2,000	4,000
240.309—Oversight responsibility report		
(a) Failure to report or to report on time	500	1,000
(b–f) Incomplete or inaccurate report	2,000	4,000
* * * * * * *		

* * * * * *

Issued in Washington, DC, on September 29, 1995.

Jolene M. Molitoris,

Administrator.

[FR Doc. 95–25183 Filed 10–11–95; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 228

[Docket No. 950823213–5213–01; I.D. 102792B]

RIN 0648–AD25

Incidental Take of Marine Mammals; Bottlenose Dolphins and Spotted Dolphins

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS is issuing regulations authorizing and governing the taking of bottlenose and spotted dolphins incidental to the removal of oil and gas drilling and production structures in state waters and on the Outer Continental Shelf (OCS) in the Gulf of Mexico. The incidental taking of small numbers of marine mammals is authorized by the Marine Mammal Protection Act (MMPA), if certain findings are made and regulations are issued that include requirements for monitoring and reporting. These regulations do not authorize the removal of the rigs as such authorization is provided by the Minerals Management Service (MMS) and is not within the jurisdiction of NMFS. Rather, these regulations authorize the unintentional incidental take of marine mammals in connection with such activities and prescribe methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat.

EFFECTIVE DATE: November 13, 1995, through November 13, 2000.

ADDRESSES: Copies of the Environmental Assessment (EA), proposed rule, and application may be obtained by writing to the Chief, Marine Mammal Division, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910–3282 or by telephoning the contact listed below.

Comments regarding the burden-hour estimate or any other aspect of the collection of information requirement contained in this rule should be sent to the above individual and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Hollingshead, Office of Protected Resources, (301) 713–2055.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region, if certain findings are made, and regulations are issued. Under the MMPA, the term ''taking'' means to harass, hunt, capture or kill or to attempt to harass, hunt, capture or kill.

Permission may be granted for periods up to 5 years if NMFS finds, after notice and opportunity for public comment, that the taking will have a negligible impact on the species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. In addition, NMFS must prescribe regulations that include permissible methods of taking and other means effecting the least practicable adverse impact on the species and its habitat, and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds and areas of similar significance. The regulations must include requirements pertaining to the monitoring and reporting of such taking.

In 1986, the MMPA and the Endangered Species Act (16 U.S.C. 1531–1543; the ESA) were amended to allow incidental takings of depleted, endangered, or threatened marine mammals. Before the 1986 amendments, section 101(a)(5) applied only to nondepleted marine mammals.

Summary of Request

On October 30, 1989, NMFS received a request from the American Petroleum

Institute (API) for an incidental take of bottlenose dolphins (*Tursiops truncatus*) and spotted dolphins (*Stenella frontalis*). API is representing operators who remove oil and gas drilling and production structures and related facilities in the Gulf of Mexico in state and Federal waters adjacent to the coasts of Texas, Louisiana, Mississippi, Alabama, and Florida. NMFS requested information and invited public comment on the request on January 30, 1990 (55 FR 3074). As a result of several requests, NMFS extended the comment period until April 16, 1990 (55 FR 10475, March 21, 1990). A number of comments were received on the initial request and, based upon the comments, the API amended it's request and resubmitted it to NMFS on December 13, 1990. NMFS again requested information and comments on the revised request on March 25, 1991 (58 FR 12361). That comment period closed on May 9, 1991.

API estimates that 670 structures will be removed in the Gulf of Mexico over a 5-year authorization period. While most of the structures are in water less than 100 ft (30.5 meters (m)) deep, a few may be in deeper water. A longer range plan estimates that about 5,500 structures will be removed in a 35-year period. Some structures have already been removed using the methods described by the API. The most frequently used procedure is to wash the soil from inside the piling, lower an explosive charge to 15 ft (4.6 m) below the mudline, and detonate the charge, which cuts the piling.

Under section 7 of the ESA, NMFS has consulted with the MMS of the Department of the Interior on the effects upon endangered and threatened sea turtles of the removal of oil and gas structures in the Gulf of Mexico. As a result of these consultations, NMFS requires the MMS and the U.S. Army Corps of Engineers (Corps), of the Department of Defense, to employ the following measures to minimize adverse impacts to listed species: (1) The use of qualified observers; (2) the conduct of 30-minute aerial surveys within 1 hour before and after detonation; (3) if sea turtles are observed within 1,000 yds (914 m) of the blast site, the delay of blast(s) until successful attempts remove the turtles at least 1,000 yds (914 m) from the site; (4) the detonation of explosives no sooner than 1 hour following sunrise and no later than 1 hour prior to sunset; and (5) the staggering of charges by at least 0.9 seconds to minimize the cumulative effects of the blasts. However, under section 7 these measures may be modified by NMFS whenever the conditions under which the section 7 consultation was conducted are modified. Under such situations, the MMS is required to reinitiate consultation with NMFS.

While bottlenose and spotted dolphins are not listed as threatened or endangered under the ESA, they are protected under the authority of the MMPA. Therefore, applicants must receive an authorization under the MMPA before a take is allowed. Similar to the case for sea turtles, impacts to dolphins would come from exposure to sound and pressure waves associated with detonating the explosives. API states that the most likely form of incidental take as a result of structure removals is harassment from low level sound and pressure waves. However, animals close enough to the detonation could be injured or killed as a result of tissue destruction. In recognition of this, removal operators have been employing the mitigation measures for sea turtles to protect dolphins as well, and API has filed the subject request for the taking of small numbers of bottlenose and spotted dolphins, by incidental harassment only, under the MMPA.

Comments and Responses on the Proposed Rule

On June 17, 1993 (58 FR 33425), NMFS published for public review and comment a proposed rule to authorize and govern the unintentional taking of a small number of bottlenose and spotted dolphins incidental to the removal of oil and gas drilling and production structures in state waters and on the OCS in the Gulf of Mexico for a period of 5 years. During the 60-day comment period, NMFS received 7 letters commenting on the proposed rule. These comments and pertinent comments received during the two petition reviews (55 FR 3074, January 30, 1990 and 56 FR 12361, March 25, 1991) are addressed below.

Comment: One commenter believed that section 101(a)(5) of the MMPA, under which the API is seeking permission for an unintentional take, is not appropriate for this purpose, as it was written to allow for indigenous groups to fish for subsistence.

Response: NMFS does not agree. Section 101(a)(5) of the MMPA was enacted in 1981 specifically to provide a means to authorize incidental takes in connection with legitimate maritime activities other than commercial or subsistence fishing. Prior to 1981, these incidental takes were prohibited by the MMPA's moratorium on taking and any such takings were subject to prosecution under the MMPA.

Comment: One commenter believed it was unclear why the structures must be removed * * * given that they have probably become * * * home to many sea creatures. Another commenter inquired on the fate of the structures and a third believed that the impacts of structure removals should be addressed in the EA.

Response: Paragraph 5 of Article 5 of the 1958 Continental Shelf Convention, a treaty to which the United States is a party, states that any installations which are abandoned or disused must be entirely removed. The Outer Continental Shelf Lands Act (1953) gives broad authority to the Secretary of the Interior to administer leasing of the OCS and to prescribe rules and regulations for the prevention of waste and conservation of the natural resources of the OCS. The Secretary of the Interior has exercised that authority through regulations and standard leasing terms. Regulations (30 CFR 250.143(a) and (b)) published on April 1, 1988, require that ''[t]he lessee shall remove all structures in a manner approved by the Regional Supervisor to assure that the location has been cleared of all obstructions to other activities in the area.'' ''All platforms (including casing, wellhead equipment, templates, and piling) shall be removed by the lessee to a depth of at least 15 feet below the ocean floor or to a depth approved by the Regional Supervisor * * *.'' In other words, removing structures allows for other uses of the OCS, such as shrimp trawling, while leaving structures upright and in place may pose a hazard to navigation. Alternatives to rig removals and their impacts on the environment were discussed by MMS in a Programmatic Environmental Assessment in 1987.[1]

All structures removed to date in U.S. waters have been salvaged either for reuse at another location, converted into an artificial reef (State rigs to reefs programs), or returned to shore for disposal.

Comment: One commenter believed it was unclear in the notice of proposed rulemaking why the structures must be blown up and that a less extreme and less damaging means of removal must be seriously evaluated and incorporated into the final rule. Other commenters expressed the opinion that sufficient attention had not been placed on alternative (nonexplosive) means for removing the structure.

[1] MMS, 1987. Structural Removal Activities Central and Western Gulf of Mexico Planning Areas. Programmatic Environmental Assessment. OCS EIS/EA MMS 87–0002.

Response: Structures are not blown-up as the term might commonly be interpreted. Prior to detonation, the deck sections (superstructure) are removed from the site leaving only the main piles, wellheads, connectors and jackets. Explosives are limited to an amount sufficient only to sever the wellhead and piles below the surface of the seabed.

According to MMS, while the use of mechanical cutters and underwater arc cutters may be successful in some circumstances, and would not produce the impulse and pressure forces associated with the detonation of explosives, a failure of the cutters would necessitate a larger explosive charge than would otherwise be required since the explosive shock wave would propagate through the partial cuts already made by the mechanical cutter. Further, in most instances, these methods are more time consuming, costly, and more hazardous to divers. Because of this, these methods are not used on a routine basis (approximately 7 percent verses 93 percent for explosives (MMS, 1987)). However, a recent report by the Government Accounting Office [2] indicates that although the use of nonexplosives for removal has increased in recent years (34 percent verses 66 percent removed using explosives) sufficient effort has not been expended by MMS to develop nonexplosive means for removal of offshore rigs. For that reason, NMFS encourages the development of these nonexplosive methods and will review progress during the 5-year term of these regulations, to determine whether a small take authorization is warranted in future years. In this regard, NMFS will request, prior to any reauthorization for this activity under section 101(a)(5), that MMS submit a report under 50 CFR 228.4(a)(9) on the development of nonexplosive technology.

Comment: One commenter stated that it was not clear what assumptions were made and what variables were considered to make the determination that pressure waves generated by the explosives will dissipate within 1,000 yd (914 m), under all circumstances, to levels which will not cause tissue or hearing damage. Also, it is not clear whether the calculations were based upon the largest explosive charges that might be used, or whether additional studies will be done to verify that sound pressure waves generated by explosive removals will dissipate to biologically insignificant levels within 1,000 yd (914 m) under all circumstances likely to be encountered.

Response: While the API application does not mention an upper limit for size of explosives, in one place it considers a 50–pound (lb) (22.7 kg) charge to be a ''worst case,'' and throughout the application the API uses 50 lbs as the standard for calculation of impact on marine mammals. However, a review of section 7 biological opinions on rig removals on file with NMFS indicates that on rare occasions explosives of 75 lbs or greater have been utilized. Therefore, to avoid potential injury to marine mammals and to make clear the level of explosives authorized under this exemption, NMFS has modified the proposed rule to limit explosives to a pressure level equivalent to the pressure generated by a 50–lb (22.7 kg) explosive charge detonated outside the rig piling. For example, under these regulations, a charge greater than 200 lbs may not be detonated inside a piling that has its top above the waterline (see below for rationale), a charge greater than 100 lbs may not be detonated in a pile with its top below the waterline and a charge greater than 50 lbs may not be detonated exterior to the pile. Please refer to the EA for additional information on this subject.

On the basis of formulas by Hill (1978) [3] and Yelverton (1973), the distance at which no injury will occur from a 50-lb (22.7 kg) explosive charge detonated in open water is 2,044 ft (623 m). Use of these same formulas indicates that injuries, such as eardrum rupture, could occur at a distance of 872.7 ft (266 m). While these distances are based upon data from terrestrial mammals, Hill (1978) has suggested that these distances probably overestimate the zones of physical influence of shock waves on marine mammals, because marine mammals have adapted to pressure for deep diving and increased protection due to their thick body walls. One commenter countered that this may be misleading as water is less compressible than air. While it is true that water is less compressible than air, it should be explained that these explosives tests were conducted in water, but on terrestrial animals. Obviously, conducting tests on the effects of explosives on live marine mammals would be controversial and an authorization may be difficult for a scientific research applicant to obtain under the MMPA. For that reason, NMFS and others base their impact assessments on mathematical calculations, supported by test data using small charges on alternative test animals.

In addition to the above research, Goertner (1982) used the results from experimental data on terrestrial animals to develop a computer simulation model for determining the region of injury to marine mammals subjected to an underwater explosion. For a 50–lb (22.7 kg) explosive charge, the model's contour plot for slight injury indicated that slight injury could occur 936 ft (285.3 m) and 1,352 ft (412.1 m) from the explosion in open water for an adult and calf bottlenose dolphin, respectively (see the application or the EA for a detailed explanation).

Because the Hill (1978) and Yelverton (1973) tests were conducted in open water, Connor (1990) determined that detonation below the mud line inside the casing resulted in a reduction of peak pressure of 50 percent compared to an open water test when the pile top is below the water surface and 75 percent when the pile top is above the water surface. Therefore, based upon these determinations, bottlenose dolphins (including calves) would be unlikely to sustain injury unless they were closer than 676 ft (206 m) for structures not reaching the water surface or 225 ft (68.6 m) for structures above the water surface (the majority of structures). As NMFS has adopted conservative safety zones to protect marine mammals from the explosives, NMFS does not believe that it is necessary to repeat these experiments, as one commenter suggests. Because NMFS has previously determined in Biological Opinions that an area of 1,000 yd (3,000 ft; 914.4 m) must be free of sea turtles before detonation can take place, and as this distance, which has been adopted by the industry for several years as the marine mammal safety zone, is significantly greater than the distance to preclude injury to bottlenose and spotted dolphins, no injuries to marine mammals are anticipated to occur provided this area does not contain any marine mammals. For that reason, if bottlenose or spotted dolphins are observed in the vicinity of the platform within 910 m (1,000 yd; 3,000 ft) of the site, detonation must not be carried out until the area is clear of dolphins or sea turtles. Because of the relatively shallow depth of the water for most structure removals (less than 100 ft (30.5 m)), the surface affinity of the requested species of marine mammals, and their relatively short dive sequences, no injuries or deaths of marine mammals are anticipated provided the mitigation measures required by the regulations are followed.

[2] U.S. Government Accounting Office. 1994. Offshore Oil and Gas Resources: Interior Can Improve Its Management of Lease Abandonment. GAO/RCED–94–82. 46pp.

[3] Reference citations can be found in the EA on this action (see **ADDRESSES**).

Comment: One commenter was concerned that the NMFS estimate that a marine mammal would need to be 910 m from a structure being removed before it would be safe seems very conservative in light of the computer model referred to. If the explosion of a 1,200-lb (544 kilogram (kg)) charge in open water might hurt a susceptible dolphin calf 4,000 ft (1,200 m) away, the range of harm from a 50–lb (22.7 kg) charge set at 15 ft (5 m) below the mud line inside a piling would, to a lay person, be expected to have a very much smaller area of impact than is postulated.

Response: NMFS agrees with this comment. However, because there can be instances when it may be necessary to detonate a 50–lb (22.7 kg) charge exterior to the pipe, NMFS has adopted this possible situation as the worst-case scenario under the application. As stated above, for a 50–lb (22.7 kg) explosive charge, contour plots indicated that slight injury could occur 936 ft (285.3 m) and 1,352 ft (412.1 m) from the explosion in open water for an adult and calf bottlenose dolphin, respectively. However, the safety range for sea turtles has been determined, through experimentation, in a Biological Opinion under section 7 of the ESA to be 3,000 ft (914 m). For consistency therefore, that range has been determined appropriate as a safety range for marine mammals also.

Comment: Several commenters noted that there are at least 30 species of marine mammals reported in the Gulf of Mexico and that conceivably could be present, at least occasionally, in areas where they could be affected by structure removal. Therefore, it is unclear to the commenter why the rule would authorize the possible incidental taking of only bottlenose dolphins and spotted dolphins. One commenter recommended that either the rule be changed to authorize the incidental taking of small numbers of any marine mammal that reasonably can be expected to occur in the northern Gulf of Mexico or specifically limiting the incidental take to the two species, noting that taking of any other marine mammal species would constitute a violation of the MMPA.

Response: The API, in it's application, requested the incidental take of bottlenose and spotted dolphins, because these two species were the only marine mammal species recorded by NMFS observers within the area of the structures. The results of recent (i.e., 1983–91) Southeast Fisheries Science Center (SEFSC) aerial and vessel surveys for cetaceans in the Gulf of Mexico indicate that the bottlenose dolphin is the most common cetacean in these waters, accounting for more than 95 percent of the sightings. Spotted dolphins were the second most frequently sighted in waters greater than 200 m. depth. However, NMFS notes that because there are two species of spotted dolphins in the Gulf of Mexico, *S. frontalis* and *S. attenuata*, and distinguishing between the two by observers is difficult, both these species will be included under the request for spotted dolphins. SEFSC scientists indicate that the probability of cetaceans other than these species being incidentally taken is remote. Therefore, NMFS does not consider it necessary, at this time, to require the applicant to request additional species.

In the event, marine mammal species other than those requested are taken (i.e., harassed, injured or killed) or if, bottlenose and/or spotted dolphins are injured or killed, such takings would be in violation of the MMPA, the regulations (modified as a result of this comment) and any Letters of Authorization (LOA) issued as a result of this rulemaking. Alternatively, if a nonrequested species of marine mammal is seen in the area prior to the detonation, but not taken because the detonation is delayed until the animal leaves, then the API may elect to request an amendment to its LOA and the authorizing regulations for future detonations.

Mitigation and Monitoring

Comment: One commenter recommended that the rule either (1) be expanded to specify and explain the rationale for situations when the onsite NMFS representative would be authorized to waive any of the mitigation or monitoring requirements, or (2) be changed to prohibit detonation of explosives when, for any reason, adequate monitoring cannot be done to ensure, with a high degree of certainty, that there are no marine mammals within the area where tissue damage or hearing damage could occur.

Response: NMFS agrees with the comment and has modified the regulations to prohibit detonations whenever the pre-detonation aerial survey monitoring requirements cannot be conducted within the time frame specified in the regulations and to limit detonations to a daylight time period.

Comment: Several commenters noted that dolphins killed as a result of the detonations, tend to sink after death and float to the surface as decomposition begins. Therefore, to evaluate the numbers of dolphins killed, but not detected floating at the surface following the blast, surveys should be undertaken at appropriate periods following removal of the oil and gas structures.

Response: NMFS agrees with this comment. As a result, NMFS will require holders of the LOAs or their contractors to undertake marine mammal/sea turtle assessment surveys after the detonation. However, because aerial and ship surveys are expensive and because the lethal range of these explosive charges are limited, NMFS has modified the monitoring requirements to accommodate concerns for the protection of the dolphins and the cost of conducting surveys. One modification is that the NMFS observer may waive the second post-detonation monitoring provided no marine mammals are sighted during either the required 48 hour pre-detonation monitoring period or the pre-detonation aerial survey. Another modification is that surveys, if required, can either be by divers using dark-water search methods or remotely-operated vehicles of the site (if visibility permits) within 24 hours of any detonation event at a site, or by either an aerial or ship survey of the area no sooner than 48 hours and no longer than 7 days after the detonation. Post-detonation ship or aerial surveys are to concentrate efforts down-current of the site. LOAs will contain specific monitoring requirements.

Also, because the seabed must be systematically trawled to ensure that no structures or debris remain above the seabed surface after detonation, any dead cetaceans or sea turtles, remaining on the scene, should eventually be recovered. Operators of this equipment would be required to report any recovered animals to the LOA holder, who would be required to report the incident to NMFS.

Reporting Requirements

Comment: One commenter requested that data from the monitoring reports be compiled and compared, periodically, with marine mammal stranding data to determine if there are any possible correlations between strandings and structure removals.

Response: NMFS agrees with this comment and will conduct this review.

Comment: One commenter recommended changing the report submittal time requirement of § 228.44(d) from 15 working days to 30 calendar days. This, the commenter remarks, would allow industry a little more time to prepare the required report.

Response: NMFS agrees and has modified the final rule to allow 30 calendar days for submitting the report to NMFS (note that the citation now

reads § 228.45(d)). Compliance with this requirement does not relieve the operator from having to comply with MMS' and/or Corps' reporting requirements.

Comment: This same commenter, for the same reasons, also believed that reporting should be on an exception basis only (i.e., if the NMFS-approved onsite observers or other personnel have an indication that a taking has occurred). A precedent for authorizing incidental taking without prior registration and requiring only exemption reporting is found at 50 CFR 229.7 for commercial fishing vessels in Category III areas (those having only a remote likelihood of incidental taking).

Response: NMFS disagrees. Activity reports (as opposed to marine mammal taking reports) are required by NMFS, among other reasons, to correlate stranding data with explosives detonations. NMFS recognizes however, that often the work is performed by contractors for the holder of a LOA. To avoid an unnecessary paperwork burden on holders, NMFS will accept the observer report as the activity report if all requirements for reporting contained in the LOA are provided to the observer before that person completes his/her report. However, in most cases the observer will have departed prior to completion of monitoring, necessitating a report by the LOA Holder.

Comment: One commenter also recommends that § 228.44(d) be expanded to specify that post-removal reports must describe the nature and location of the structure removed; the date, time, and manner by which the structure was removed; the weather conditions during the pre- and post-removal surveys; the nature and results of the pre- and post-removal marine mammal surveys; any actions taken to cause or encourage animals to leave the area where they might be killed or injured by explosive detonations; and any incidents where animals were, or may have been killed or injured as a result of structure removal.

Response: NMFS agrees with the intent of this comment. NMFS prefers to allow some flexibility in making site-specific requirements however, and therefore will impose these requirements through the LOA rather than these regulations.

Letters of Authorization

Comment: One commenter recommended that the rule be expanded to require that requests for a LOA include a description of the procedures that will be used to (1) detect the presence of marine mammals in and near the area where they could be affected by structure removal; (2) ensure, with a high degree of certainty, that no marine mammals are within 1,000 yd (941 m) of the structure when explosives are detonated; and (3) verify that no marine mammals were killed or injured by the detonation of explosives. Also, the commenter notes with regard to (1) and (2), that most cetaceans produce species-specific sounds and that acoustic monitoring therefore might be an additional tool for detecting animals in or near the potential hazard zone.

Response: NMFS does not consider it necessary for applicants to state, in their request for a LOA, the mitigation measures that they will employ to avoid an incidental take of a marine mammal, since these measures are required by regulation and will be required in the LOA. It should be recognized that required mitigation measures are the minimum that a LOA holder must meet; additional measures may be employed at the discretion of the holder.

The species of marine mammals inhabiting the waters in the vicinity of oil and gas structures are surface-inhabiting, short-duration diving animals that are easily visible to observers. Therefore, it is not necessary at this time to require sophisticated, state-of-the-art monitoring systems to detect marine mammals within the 1,352 ft (412.1 m) danger zone or the 3,000 ft (914.4 m) safety zone.

Comment: One commenter believed that the rule appears to require an individual LOA for each platform removal operation. The commenter recommended that, because operations to remove oil and gas structures in the Gulf are basically very similar, the LOA and associated notices in the Federal Register should not be required.

Response: The regulations make clear that an LOA is required to be held by each company operating or previously operating the platform and thereby responsible for removing the structure under MMS regulations. The actual company removing the structure would be considered an agent of the holder of the LOA. NMFS expects companies will apply annually for an LOA and in that application will provide a list of structures anticipated to be removed by them or their contractors in that year.

Environmental Concerns

Comment: Hazardous substances may be deposited and accumulate in sediments around production platforms. If disturbed and resuspended in the water column, these materials may enter the marine food web and be biomagnified in dolphins and other top carnivores.

Response: Impacts resulting from resuspension of bottom sediments include increased water turbidity and mobilization of sediments containing hydrocarbon extraction waste (drill mud, cuttings, etc.) in the water column. The magnitude and extent of any turbidity increases would depend upon the hydrographic parameters of the area, nature and duration of the activity, and size and composition of the bottom material (MMS, 1987). Resuspension of bottom sediments, and solid, liquid, and gaseous discharges would be generated by removal and transportation operations.

Increased turbidity would temporarily impact photic processes at the removal site and reduce primary productivity. The potential effects of mobilizing sediments with the drilling and production wastes could also impact the localized marine environment, depending on the quantities of sediment disturbed, the remaining constituents from the drilling and development operations, local, hydrographic effects, and the biota of the immediate area (MMS, 1984 in MMS, 1987). Several sources [4] indicate that the overall impacts to water quality from resuspension of hydrocarbon extraction wastes is expected to be temporary and limited in scope to the immediate, localized structure-removal sites. Also, because of the temporary nature of resuspension, impacts to marine mammals or their habitat are unlikely.

Other Concerns

Comment: One commenter requested that the rule become effective on the date of publication in the Federal Register and not on January 1, 1993 as stated in the environmental assessment.

Response: The regulations will become effective November 13, 1995.

Changes from the Proposed Rule

Based upon the comments received on the proposed rule and previous reviews of the petition, the following modifications have been made:

1. The rule makes clear that the total authorized taking is limited to 1,000 bottlenose and spotted dolphins by harassment and that the taking of other species of marine mammals is not authorized. The API in its application requested an authorization for 100 takes by harassment of bottlenose and spotted dolphins during the 5-year authorization. NMFS scientists reviewing the application consider this number to be low and recommend an authorization for 1,000 dolphins during

[4] National Academy of Sciences (1983), IMCo et. al. (1969), Neff (1981) among others.

this 5-year period (670 structures ÷ 5 years = 134 rigs/year; 1,000 dolphins ÷ 5 years = 200 dolphins/yr; 200 dolphins ÷ 134 rigs = approximately 1.5 harassment takes/rig removed). This authorized level of taking, limited to harassment, is still considered to be small and having a negligible impact on the species or stocks of marine mammals involved.

2. Because of the difficulty in distinguishing between the two species of spotted dolphins found in the Gulf of Mexico, NMFS is authorizing the take of both species.

3. NMFS has modified the regulations to prohibit detonations whenever the pre-detonation aerial monitoring cannot be conducted and to limit detonations to a daylight time period;

4. A second post-detonation aerial or vessel survey will be required to be conducted no earlier than 48 hours and no later than 1 week after the oil and gas structure is removed, unless a systematic diver or remotely-operated vehicle survey of the site can be, and is, successfully conducted within 24 hours of the any detonation event. Aerial and vessel surveys will be required to be systematic and to concentrate down-current from the structure.

5. The NMFS observer may waive post-detonation monitoring described in paragraph 4 above provided no marine mammals were sighted during either the required 48 hour pre-detonation monitoring period or during the pre-detonation aerial survey.

6. NMFS has modified the regulations to limit explosives to a pressure level equivalent to the pressure generated by a 50-lb (22.7 kg) explosive charge detonated outside the rig piling.

7. NMFS has modified the regulations to change the reporting requirement from 15 working days to 30 calendar days for submission of the reports to NMFS and to allow required information to be provided to the NMFS observer.

8. New paragraphs have been added to clarify prohibited methods of taking (§ 228.44), renewal of LOAs (§ 228.47) and modifications to LOAs (§ 228.48).

9. A new address for the Southeast Regional Office, NMFS has been provided.

Summary of Rule

This rule authorizes the incidental taking of bottlenose dolphins and spotted dolphins by U.S. citizens engaged in removing oil and gas drilling and production structures in state and Federal waters in the Gulf of Mexico adjacent to the coasts of Texas, Louisiana, Mississippi, Alabama, and Florida over the next 5 years.

The rule requires that all activities be conducted in a manner that minimizes adverse effects on bottlenose dolphins and spotted dolphins and their habitat. Safeguards, monitoring, and reporting requirements would be consistent with those in place at the time of this proposal for the incidental take of endangered and threatened sea turtles authorized for the same activities under the ESA.

Description of Removal Activities

The technology most commonly used in the dismantling of platforms includes: Bulk explosives, shaped explosive charges, mechanical and abrasive cutters, and underwater arc cutters. The use of bulk explosives has become the industry's standard procedure for severing pilings, well conductors and related supporting structures. When using bulk charges, the inside of the structure's piles are washed out to at least 15 ft (4.6 m) below the sediment floor to allow placement of explosives inside of the structure. Such placement results in a decrease in the impulse and pressure forces released into the water column upon detonation. The sizes of the explosive charges are generally 50 lb (22.7 kg) or less, but can be as much as 200 lb (90.8 kg) when necessary.[5] The use of high velocity shaped charges is reported to have some advantages over bulk explosives and has been used in combination with smaller bulk charges. The cutting action obtained by a shaped charge is accomplished by focusing the explosive energy with a conical metallic liner. A major advantage associated with use of high velocity shaped charges is that a smaller amount of explosive charge is required to sever the structure, which also results in reductions in the impulse and pressure forces released into the water column. Use of mechanical cutters and underwater arc cutters can be successful in some circumstances and because they do not produce the impulse and pressure forces associated with detonation of explosives, do not involve the incidental taking of marine mammals. According to MMS, these methods are, in most instances, more time-consuming, costly and hazardous to divers. Furthermore, if the use of mechanical or arc cutters were to fail before the structure was completely severed, a larger charge may be necessary to remove the structure.

[5] The use of explosive charges greater than 50 lb requires a reinitiation of consultation under the ESA with NMFS prior to removal of the rig.

Description of Habitat and Marine Mammals Affected by Oil and Gas Rig Removals

A description of the Gulf of Mexico continental shelf area and the biology and abundance of the three marine mammal species in the Gulf of Mexico that are anticipated to be taken by this activity can be found in the EA prepared for this rulemaking. This information can also be found in the proposed rule (58 FR 33425, June 17, 1993) and need not be repeated here. Copies of the EA and proposed rule are available upon request (see **ADDRESSES**).

Potential Impact of Removal Activities on Bottlenose and Spotted Dolphins

The potential for injury to marine mammals in the vicinity of underwater explosions is associated with gas-containing internal organs, such as the lungs and intestines. The extent of potential injury decreases as: (1) Distance of the marine mammal from the explosion increases, (2) size of the marine mammal increases, (3) depth of the explosion and the affected marine mammal decreases, and (4) size of the explosive charge decreases. In addition, explosive charges confined in structure pilings below the mudline produce shock waves of lower pressure (at a given distance from the explosion) than free-water explosions.

A computer model, developed to predict the distances from which marine mammals would suffer only slight injury from underwater explosions, estimated that a bottlenose dolphin calf would receive only slight injury about 4,000 ft (1,200 m) from a 1,200-lb (544–kg) charge detonated in open water at a depth of 125 ft (38 m). Most structures scheduled for removal are located in water less than 100 ft (38 m) deep. In most cases, charges are no greater than 50 lb (22.7 kg) and are confined within the structure piles about 15 ft (4.6 m) below the mudline. Therefore, as explained in detail in the application and EA, it may be assumed that marine mammals more than 3,000 ft (910 m) from structures to be removed would avoid injury caused by the explosions.

An increase in strandings of bottlenose dolphins in the northwestern Gulf of Mexico occurred in March and April 1986 following the explosive removal of oil and gas structures in the area. However, there is no evidence linking the strandings to the removal of the structures. Furthermore, observers at removals of more than 525 structures in the Gulf of Mexico reported no indication of injury or death to bottlenose or spotted dolphins, or any

other marine mammal related to these structure removals.

While the best scientific information currently available indicates that odontocete cetaceans cannot hear well in the frequencies emitted by explosive detonations (Richardson et al., 1991), and as additional evidence indicates that they may not be able to hear the pulse generated from open-water underwater detonations of explosive charges because it is very brief (*ca*. 0.05 sec) (Lehto 1992), for purposes of this rulemaking, bottlenose and spotted dolphins will be considered to be taken by harassment, as a result of a noninjurious physiological response to the explosion-generated shockwave. For example, Turl (1993) has suggested that Atlantic bottlenose dolphins may be able to detect low frequency sound by some mechanism other then conventional hearing. In addition, there may be harassment due to tactile stings from the shockwave accompanying detonations. This type of taking has been inferred from studies on humans and seems plausible given studies on dolphin skin sensitivity where researchers (Ridgway, S.H. and D.A. Carter. 1993; 1990) concluded that the most sensitive areas of the dolphin skin (mouth, eyes, snout, melon and blowhole) are about as sensitive as the skin of human lips and fingers.[6] Therefore, even if dolphins are not capable of hearing the acoustic signature of the explosion, physiological or behavioral responses to those detonations may still result.

Conclusion

For the reasons discussed above and in an EA prepared for this rulemaking, NMFS finds that the proposed activity will result in the taking of only small numbers of bottlenose and spotted dolphins by harassment; the total of such taking during a 5-year period will have a negligible impact on these species; and the takings will not have an unmitigable adverse impact on the availability of bottlenose and spotted dolphins for subsistence uses.

National Environmental Policy Act (NEPA)

The Assistant Administrator for Fisheries, NOAA (AA) has determined, based on an EA prepared by NMFS under NEPA, that this action will not have a significant impact on the human environment. As a result of that determination, an environmental impact statement has not been prepared.

Classification

This final rule has been determined to be not significant for purposes of E.O. 12866.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Small Business Administration when this rule was proposed, that, if adopted, this rule would not have a significant economic impact on a substantial number of small entities. This rule will authorize the incidental taking of marine mammals that otherwise would be prohibited by the MMPA. Accordingly, no regulatory flexibility analysis was required or prepared. Only about 10 small businesses are active in removing oil and gas structures in the Gulf of Mexico. These small businesses work under contract to major petroleum companies, which bear the costs of mitigation measures. Moreover, the mitigation measures required by this rule are identical to those already being followed by these small businesses during removal of oil and gas structures to protect endangered and threatened sea turtles.

This rule contains collection-of-information requirements subject to the Paperwork Reduction Act. These requirements have been approved by the Office of Management and Budget (OMB) under section 3504(b) of the Paperwork Reduction Act issued under OMB Control number 0648–0151. Public reporting burden for this collection of information is estimated to average 27.5 hours per response, including the time to review instructions, search existing data sources, gather and maintain the data needed and complete and review the collection of information.

The AA has determined that this rule is consistent to the maximum extent practicable with the approved Coastal Zone Management Program of the States of Florida, Alabama, Mississippi, and Louisiana. During the proposed rule stage, this determination was submitted for review to the responsible State agencies under section 3.7 of the Coastal Zone Management Act.

List of Subjects in 50 CFR Part 228

Marine mammals, Reporting and recordkeeping requirements.

Dated: October 4, 1995.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 228 is amended as follows:

PART 228—REGULATIONS GOVERNING SMALL TAKES OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

1. The authority citation for part 228 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq*.

2. A new subpart E, consisting of §§ 228.41 through 228.48 is added to read as follows:

Subpart E—Taking of Bottlenose Dolphins and Spotted Dolphins Incidental to Oil and Gas Structure Removal Activities

Sec.

Subpart E—Taking of Bottlenose Dolphins and Spotted Dolphins Incidental to Oil and Gas Structure Removal Activities

§ 228.41 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the incidental taking of marine mammals by U.S. citizens engaged in removing oil and gas drilling and production structures in state waters and on the Outer Continental Shelf in the Gulf of Mexico adjacent to the coasts of Texas, Louisiana, Alabama, Mississippi, and Florida. The incidental, but not intentional, taking of marine mammals by U.S. citizens holding a Letter of Authorization is permitted during the course of severing pilings, well conductors, and related supporting structures, and other activities related to the removal of the oil well structure.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited annually to a combined total of no more than 200 takings by harassment of bottlenose dolphins (*Tursiops*

[6] Until tests can be conducted to determine the overall sensitivity of the skin of marine mammals, NMFS has made the assumption that both humans and marine mammals have similar tactile sensitivity in the water.

truncatus) and spotted dolphins (*Stenella frontalis* and *S. attenuata*).

§ 228.42 Effective dates.

Regulations in this subpart are effective from November 13, 1995 through November 13, 2000.

§ 228.43 Permissible methods of taking; mitigation.

(a) The use of the following means in conducting the activities identified in § 228.41 is permissible: Bulk explosives, shaped explosive charges, mechanical or abrasive cutters, and underwater arc cutters.

(b) All activities identified in § 228.41 must be conducted in a manner that minimizes, to the greatest extent practicable, adverse effects on bottlenose dolphins, spotted dolphins, and their habitat. When using explosives, the following mitigation measures must be utilized:

(1)(i) If bottlenose or spotted dolphins are observed within 3,000 ft (910 m) of the platform prior to detonating charges, detonation must be delayed until either the marine mammal(s) are more than 3,000 ft (910 m) from the platform or actions (e.g., operating a vessel in the vicinity of the dolphins to stimulate bow riding, then steering the vessel away from the structure to be removed) are successful in removing them at least 3,000 ft (910 m) from the detonation site;

(ii) Whenever the conditions described in paragraph (b)(1)(i) of this section occur, the aerial survey required under § 228.45(b)(1) must be repeated prior to detonation of charges if the timing requirements of § 228.45(b)(1) cannot be met.

(2) Detonation of explosives must occur no earlier than 1 hour after sunrise and no later than 1 hour before sunset;

(3) If weather and/or sea conditions preclude adequate aerial, shipboard or subsurface surveillance, detonations must be delayed until conditions improve sufficiently for surveillance to be undertaken; and

(4) Detonations must be staggered by a minimum of 0.9 seconds for each group of charges.

§ 228.44 Prohibitions.

Notwithstanding takings authorized by § 228.43 or by a Letter of Authorization issued under § 228.6, the following activities are prohibited:

(a) The taking of a marine mammal that is other than unintentional, except that the intentional passive herding of dolphins from the vicinity of the platform may be authorized under section 109(h) of the Act as described in a Letter of Authorization;

(b) The violation of, or failure to comply with, the terms, conditions, and requirements of this part or a Letter of Authorization issued or renewed under § 228.6 or § 228.46;

(c) The incidental taking of any marine mammal of a species either not specified in this subpart or whenever the incidental taking authorization for authorized species has been reached; and

(d) The use of single explosive charges having an impulse and pressure greater than that generated by a 50–lb (22.7 kg) explosive charge detonated outside the rig piling.

§ 228.45 Requirements for monitoring and reporting.

(a) Observer(s) approved by the National Marine Fisheries Service in advance of the detonation must be used to monitor the area around the site prior to, during, and after detonation of charges.

(b)(1) Both before and after each detonation episode, an aerial survey by NMFS-approved observers must be conducted for a period not less than 30 minutes within 1 hour of the detonation episode. To ensure that no marine mammals are within the designated 3,000 ft (1,000 yd, 941 m) safety zone nor are likely to enter the designated safety zone prior to or at the time of detonation, the pre-detonation survey must encompass all waters within one nautical mile of the structure.

(2) A second post-detonation aerial or vessel survey of the detonation site must be conducted no earlier than 48 hours and no later than 1 week after the oil and gas structure is removed, unless a systematic underwater survey, either by divers or remotely-operated vehicles, dedicated to marine mammals and sea turtles, of the site has been successfully conducted within 24 hours of the detonation event. The aerial or vessel survey must be systematic and concentrate down-current from the structure.

(3) The NMFS observer may waive post-detonation monitoring described in paragraph (b)(2) of this section provided no marine mammals were sighted by the observer during either the required 48 hour pre-detonation monitoring period or during the pre-detonation aerial survey.

(c) During all diving operations (working dives as required in the course of the removals), divers must be instructed to scan the subsurface areas surrounding the platform (detonation) sites for bottlenose or spotted dolphins and if marine mammals are sighted to inform either the U.S. government observer or the agent of the holder of the Letter of Authorization immediately upon surfacing.

(d)(1) A report summarizing the results of structure removal activities, mitigation measures, monitoring efforts, and other information as required by a Letter of Authorization, must be submitted to the Director, NMFS, Southeast Region, 9721 Executive Center Drive N, St. Petersburg, FL 33702 within 30 calendar days of completion of the removal of the rig.

(2) NMFS will accept the U.S. Government observer report as the activity report if all requirements for reporting contained in the Letter of Authorization are provided to that observer before the observer's report is complete.

§ 228.46 Letters of Authorization.

(a) To incidentally take bottlenose and spotted dolphins pursuant to these regulations, each company operating or which operated an oil or gas structure in the geographical area described in § 228.41, and which is responsible for abandonment or removal of the platform, must apply for and obtain a Letter of Authorization in accordance with § 228.6.

(b) A copy of the Letter of Authorization must be in the possession of the persons conducting activities that may involve incidental takings of bottlenose and spotted dolphins.

§ 228.47 Renewal of Letters of Authorization.

(a) A Letter of Authorization issued under § 228.6 for the activity identified in § 228.41 will be renewed annually upon:

(1) Timely receipt of the reports required under § 228.45(d), which have been reviewed by the Assistant Administrator and determined to be acceptable;

(2) A determination that the maximum incidental take authorizations in § 228.41(b) will not be exceeded; and

(3) A determination that the mitigation measures required under § 228.43(b) and the Letter of Authorization have been undertaken.

(b) If a species' annual authorization is exceeded, the Assistant Administrator will review the documentation submitted with the annual reports required under § 228.45(d), to determine that the taking is not having more than a negligible impact on the species or stock involved.

(c) Notice of issuance of a renewal of the Letter of Authorization will be published in the Federal Register.

§ 228.48 Modifications to Letters of Authorization.

(a) In addition to complying with the provisions of § 228.6, except as provided in paragraph (b) of this section, no substantive modification, including withdrawal or suspension, to the Letter of Authorization issued pursuant to § 228.6 and subject to the provisions of this subpart shall be made until after notice and an opportunity for public comment. For purposes of this paragraph, renewal of a Letter of Authorization under § 228.47, without modification, is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 228.41(b), the Letter of Authorization issued pursuant to § 228.6, or renewed pursuant to this section may be substantively modified without prior notice and an opportunity for public comment. A notice will be published in the Federal Register subsequent to the action.

[FR Doc. 95–25196 Filed 10–11–95; 8:45 am]

BILLING CODE 3510–22–F

50 CFR Part 675

[Docket No. 950206040–5040–01; I.D. 100695A]

Groundfish of the Bering Sea and Aleutian Islands Area; Yellowfin Sole in the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Closure.

SUMMARY: NMFS is closing the directed fishery for yellowfin sole by vessels using trawl gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the second seasonal bycatch allowance of Pacific halibut apportioned to the trawl yellowfin sole fishery category in the BSAI.

EFFECTIVE DATE: 12 noon, Alaska local time (A.l.t.), October 8, 1995, until 12 midnight, A.l.t., December 31, 1995.

FOR FURTHER INFORMATION CONTACT: Mary Furuness, 907–586-7228.

SUPPLEMENTARY INFORMATION: The groundfish fishery in the BSAI exclusive economic zone is managed by NMFS according to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson Fishery Conservation and Management Act. Fishing by U.S. vessels is governed by regulations implementing the FMP at 50 CFR parts 620 and 675.

The second seasonal bycatch allowance of Pacific halibut for the BSAI trawl yellowfin sole fishery, which is defined at § 675.21(b)(1)(iii)(B)(1), was established as 470 metric tons (mt) by the Final 1995 Harvest Specifications of Groundfish (60 FR 8479, February 14, 1995).

The Director, Alaska Region, NMFS, has determined, in accordance with § 675.21(c)(1)(iii), that the second seasonal bycatch allowance of Pacific halibut apportioned to the trawl yellowfin sole fishery in the BSAI has been caught. Therefore, NMFS is prohibiting directed fishing for yellowfin sole by vessels using trawl gear in the BSAI.

Maximum retainable bycatch amounts for applicable gear types may be found in the regulations at § 675.20(h).

Classification

This action is taken under 50 CFR 675.20 and is exempt from review under E.O. 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 6, 1995.

Richard W. Surdi,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 95–25275 Filed 10–6–95; 3:36 pm]

BILLING CODE 3510–22–F